IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 478

ROSCOE A. COFFMAN, Petitioner

v.

FEDERAL LABORATORIES, INC., Respondent
UNITED STATES OF AMERICA, Intervenor

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF IN SUPPORT OF THE PETITION

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A full reply to the brief for the United States in opposition to our petition for a writ of certiorari is not necessary, because in our petition and original brief in support thereof we have met all of the Government's principal contentions. Only two matters require further comment.

The Government's brief is erroneous in saying (p. 14) that proceeding in the Court of Claims would not estop the petitioner from attacking the provision limiting the compensation recoverable on the ground that: "By suing in the Court of Claims he would not be seeking any license, franchise or special benefit conferred by the Act, a condition precedent to the interposition of an estoppel."

By suing in the Court of Claims the petitioner *would* be seeking a benefit conferred by the Act, namely, recovery against the United States, a benefit to which no law entitles him except Section 2 of the Royalty Adjustment Act, 56 Stat. 1013, 35 U.S.C. § 90. Without that section he would of course have no right to sue the United States, but only the right to sue the respondent for breach of contract. He is given the right to sue the United States only *cum onere*.

United States v. Causby, 328 U. S. 256, cited at p. 15 of the brief for the United States, does not indicate the existence of an alternative to suit under Section 2 of the Royalty Adjustment Act. The cases proving that the Court of Claims cannot give petitioner anything more than Section 2 allows are set forth at pp. 40-46 of the supplemental brief which we filed as *amici curiae* at No. 11 October Term, 1946, in *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U. S. 129. The leading case is *Schillinger v. United States*, 155 U. S. 163, of which we said in that brief:

> "*Schillinger v. United States*, 155 U. S. 163, was a suit in the Court of Claims against the United States for the use of a patented invention by a government contractor. Mr. Justice Brewer, delivering the opinion of the Court, said at p. 166:
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> > 'The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts

may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.'

The Court held that the claim sounded in tort and therefore recovery was not authorized under the Tucker Act of March 3, 1887, 24 Stat. 505, c. 359, which gave the Court of Claims jurisdiction over 'All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. * * *.' In interpreting this provision the opinion said at p. 168:

'It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for

> public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.' "

To show that *United States v. Causby, supra,* does not militate against the doctrine of the *Schillinger* case we need only quote again from that brief at pp. 46-49:

> "It will hardly be argued that the Court of Claims can disregard the limits set by the Royalty Adjustment Act upon recovery by the petitioner and give it under some other act, such as the Tucker Act, the full compensation guaranteed to it by the Constitution. No case holds that the Court of Claims can do so. In *United States v. Causby,* 328 U.S. 256, it is true, that court was held to have jurisdiction to allow recovery for a taking of land by frequent flying of planes over it at low levels by the United States, and Mr. Justice Douglas, delivering the opinion of the Court, said at p. 267:
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> > 'If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine. See Hollister v. Benedict & Burnham Mfg. Co., 113 U. S. 59, 67, 5 S. Ct. 717, 721, 28 L.Ed.

901; Hurley v. Kincaid, 285 U. S. 95, 104, 52 S. Ct. 267, 269, 76 L.Ed. 637; Yearsley v. W. A. Ross Construction Co., 309 U. S. 18, 21, 60 S. Ct. 413, 415, 84 L.Ed. 554.'

It will be observed from an examination of each of the cases cited in the preceding sentence that the Court held that the Government had impliedly promised to pay just compensation for the property taken and that this implied promise was the basis for the remedy by suit in the Court of Claims. In the case at bar, however, by the Royalty Adjustment Act the Government has not promised to pay just compensation, but only just compensation taking into account conditions of wartime production, and subject to defenses which could not be asserted by the licensee. A promise to pay just compensation without restriction cannot be implied in the teeth of the restrictions imposed by the Act upon the payment of compensation.

"The opinion in the *Causby* case cannot be construed to mean that under the Tucker Act an implied contract is not the necessary basis for a suit for compensation for the taking of property. Certainly a tortious taking could not be the basis for such a suit. We submit that there was no intent to overrule *sub silentio* the doctrine of *Schillinger v. United States,* 155 U. S. 163, and the long line of cases following it, some of which are cited in the opinion of the Court, by Mr. Justice Brandeis, in *United States v. North American Transportation & Trading Co.,* 253 U. S. 330, at 335*.

"* See also *Gibbons v. United States,* 8 Wall. 269, 274; *Langford v. United States,* 101 U. S. 341,

"We believe that what was meant in the *Causby* case by the treatment of the point as to jurisdiction— a point not fully argued in the briefs or elaborated upon in the opinion of the Court—was this: In that case the circumstances were such that if a taking existed there would be an implied contract to pay for the land, and therefore the owners of the land taken could enforce their claim 'founded upon the Constitution' under the Tucker Act. The Court did not hold that the Tucker Act gives a right to recover for *any* denial of the guaranties of the Constitution. In any event, the decision was simply an interpretation of the Act under which suit had been brought. It did not hold that the Court of Claims could disregard limitations imposed by an Act of Congress. It could not follow from this decision that if the petitioner in the case at bar were to sue in the Court of Claims it could recover more than the limited amount allowed by the

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343-346; *Hill v. United States,* 149 U. S. 593, 598-599; *United States v. Berdan Fire-Arms Mfg. Co.,* 156 U. S. 552, 566; *Belknap v. Schild,* 161 U. S. 10, 17; *Russell v. United States,* 182 U. S. 516, 530; *Ribas y Hijo v. United States,* 194 U. S. 315, 323; *Harley v. United States,* 198 U. S. 229, 234; *Juragua Iron Co. v. United States,* 212 U. S. 297, 302-303, 309; *Crozier v. Krupp Aktiengesellschaft,* 224 U. S. 290, 303-304; *United States v. Societe Anonyme des Anciens Etablissements Cail,* 224 U. S. 309, 311; *Peabody v. United States,* 231 U. S. 530, 539; *Farnham v. United States,* 240 U. S. 537, 540; *Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co.,* 246 U. S. 28, 39-41; *Tempel v. United States,* 248 U. S. 121, 129-130; *Bliss Co. v. United States,* 253 U. S. 187, 190-191; *Lynch v. United States,* 292 U. S. 571, 582."

Royalty Adjustment Act. The Court of Claims could let it recover only under that Act. If, as we contend, that Act is unconstitutional, it could not recover under the Tucker Act or any other Act; for, except for the Royalty Adjustment Act, petitioner's right is simply a common law right of action against" the licensee.

Respectfully submitted,

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